THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 04-03-2002

Coram:

THE HONOURABLE MR. JUSTICE M. KARPAGAVINAYAGAM

CRIMINAL REVISION CASE Nos.120 of 2000 and CRIMINAL REVISION CASE Nos 206 of 2000

Rajendran ..Petitioner in
Crl.R.C.No.120/2000

1. Arokiasamy
2. John Britto
3. Stanley
4. Manekshaw
5. M.Ponraj .. Petitioners in
Crl.R.C.No.206/2000

Vs.

State of Tamil Nadu rep. by
the Inspector of Police,
Tuticorin South Police Station,
Tuticorin. .. Respondent in
both the cases.

Criminal Revision Cases against the judgment dated 9.12.1999 in C.A.No.35 of 1999 on the file of the Principal Sessions Judge, Tuticorin, confirming the judgment dated 2.7.1999 in S.C.No.332 of 1991 on the file of the Assistant Sessions Judge, Tutic .

! For Petitioner in
Crl.R.C.120/2000 : Mr.O.Venkatachalam
For Petitioners in
Crl.R.C.206/2000 : Mr.G.R.Edmund

^ For Respondent : Mr.E.Raja, Addl.P.P.

: COMMON ORDER

On 13.4.1990 mid night at 2.00 A.M., the victim girl Kalaiselvi P.W.1 aged about 19 years along with her sister P.W.2 aged about 12 years was proceeding towards home after attending the Thiruvizha function at Esakiamman temple. The accused 1 to 10 who came in three cycles waylaid

them and forcibly kidnapped P.W.1 by putting in the cycle and took her to a place where a new construction was being done and made her to lie down on the sand portion of the new built up house and all of them committed gang rape.

2. All the 10 accused were facing trial in S.C.No.332 of 1991 in respect of the above accusation. After trial, all were convicted for the offences under Sections 366 and 376(g) of I.P.C. and sentenced to undergo rigorous imprisonment for five years on each count and the sentences were directed to run concurrently.

3. All the accused, i.e. A1 to A10 filed a common appeal before the appellate Court challenging the conviction and sentence in C.A.No.35 of 1999. The appellate Court confirmed the conviction and sentence imposed by the trial Court and dismissed the appeal. Challenging the

same, A1 Arokiyasamy, A4 John Britto, A5 Stanley, A6 Maneksha and A3 Ponraj filed a separate revision in Crl.R.C.No.206 of 2000 and A8 Rajendran filed a separate revision in Crl.R.C.No.120 of 2000.

4. These matters were admitted by this Court, but however, the bail was refused pending revision. When these matters were taken up by Justice R.Balasubramanian, on noticing that minimum sentence of 10 years was a not imposed under Section 376(g) I.P.C. on the petitioners in the revisions, by the order dated 21.8.2001, issued a show cause notice to each of the revision petitioner as to why their sentence for the offence under Section 376(g) shall not be enhanced to a minimum sentence of 10 years prescribed under law.

5. Only after receipt of the notice, the petitioner Rajendran in Crl.R.C.No.120 of 2000 and the petitioners in Crl.R.C.No.206 of 2000 have sent letters to the Court requesting permission to withdraw the revision, as they are prepared to undergo the sentence of five years imposed by the Courts below.

6. When these matters were taken up by this Court for disposal of the revisions as well as suo motu proceedings, it was represented by the counsel Mr.Edmund that the petitioners have already sent a letter to the Registry seeking permission for withdrawal of the revision. However, when it was pointed out by this Court to the counsel for the petitioners that since already suo motu notice has been issued to the petitioners, it may not be proper to give such permission for withdrawal, the counsel for the petitioners would submit that they are prepared to argue on merits. Accordingly, the matter was posted for several hearings.

7. Both the counsel Mr.Edmund and Mr.Venkatachalam appearing in these two revisions were heard at length both on merits in the revisions as well as in the suo motu proceedings for enhancement of sentence.

8. The learned Additional Public Prosecutor would submit that though the lower Court has not imposed minimum sentence which is

prescribed under law, this Court can enhance the same to minimum sentence, as there are no adequate and special reasons to reduce the minimum sentence prescribed for this heinous offence. He would also submit that the conviction for the offence under Sections 366 and 376(g) I.P.C. imposed by the Courts below is valid.

9.5. Let us now see the facts of the case.

(a) P.W.1 Kalaiselvi is aged about 19 years. P.W.2 Shanthi is her sister aged about 12 years. P.W.3 Raj is their elder brother. All of them were residing in 4th Street, Subbiah Mudaliarpuram, Tuticorin, along with their parents. On 12.4.1990 at about 8.00 P.M., P.W.3 Raj and his sisters P.Ws.1 and 2 along with his friends went to Palayamkottai Road to participate in the Kodai Vizha function in the Esakiamman temple.

(b) AT 2.00 A.M. midnight, both P.Ws.1 and 2 felt sleepy. Therefore, they left the place without informing P.W.3 as he was sitting in the Gents side and were proceeding towards their house. When they were walking along the road near Noon Meal Centre, Chidambara Nagar, they heard the sound from rear side. When they turned back, they saw six persons were coming towards them in three cy cles and four other persons were following the cycles. They asked P.Ws.1 and 2 shouting When P.Ws.1 and 2 tried to run away from the place, all the 10 persons surrounded them. When P.Ws.1 and 2 requested them to leave them stating that they belong to a good family, A4 John Britto with blunt portion of the aruval assaulted on the back of P.W.1 and A3 Ponraj assaulted P.W.2. Then, both A5 Stanley and A6 Maneksha put the cloth into the mouth of P.W.1 and forcibly took her in the cycle and brought her to Kattabomman Nagar. On seeing that P.W.1 was forcibly kidnapped by the said persons, P.W.2 went to the temple and informed the same to P.W.3.

(c) In the meantime, P.W.1 was taken to southern corner of the Kattabomman Nagar. There, a newly constructed house without completing construction was situated and nobody was inside. P.W.1 was forcibly taken inside the room of the house and was made to lie down on the sand. Then, A4 John Britto and A5 Stanley caught hold of her hands; A2 Muthukumar and A3 Ponraj caught hold of her legs and A6 Maneksha put the cloth into her mouth to prevent her from shouting. Thereafter, A1 Arokiyasamy committed rape on her by removing her saree. Then, all the other accused one after another committed a gang rape.

(d) In the meantime, P.W.3 on getting information from P.W.2 came to the scene. He found that 10 persons came out and took the cycles and fled away. He went inside the room and saw P.W.1 lying down with injuries. She was unable to get up. Then, P.W.3 took her to the house. Thereafter, P.W.1, P.W.2 along with their mother came to the Police Station. P.W.1 gave a complaint to P.W.7 Head Constable at 5.00 A.M. P.W.7 registered the same in Crime No.382/90 for the offence under Sections 323, 324, 506(ii), 366 and 376 I.P.C. He recovered the clothes of the victim M.Os.1 to 6. Then, he sent her to the Doctor.

(e) P.W.4 Dr.Gomathi attached to the Government Hospital examined P. W.1 and found injuries on the breast and the right hand and also found hymen ruptured. She issued Ex.P2 giving opinion that she was subjected to sexual intercourse.

(f) P.W.9, the Sub Inspector of Police took up investigation, came to the scene at 6.30 A.M. and prepared observation mahazar Ex.P4 and recovered the clothes M.O.5, M.O.6 and M.O.7 under mahazar Ex.P5 attested by P.W.6 Thalayari. P.W.10, the Inspector of Police arrested the accused on 15.4.1990 at about 5.30 P.M. and recovered their clothes. They were sent for the Potency test. Then, his successor P.W.11 took up further investigation and examined the witnesses and filed a charge sheet for the offences under Sections 366, 376 and 323 I.P.C.

10. During the course of trial, P.Ws.1 to 11 were examined, Exs.P.1 to P22 were filed and M.O.1 to M.O.27 were marked.

11. When the accused were questioned, they pleaded innocence. Ultimately, the trial Court though acquitted the petitioners in respect of the offence under Section 323 I.P.C., convicted them for the offences under Sections 366 and 376(g) I.P.C. and sentenced them to undergo R.I. for five years for each of the offences and the same was confirmed in the appeal.

12. The contentions in brief urged by the counsel Mr.Edmund appearing for the petitioners in Crl.R.C.No.206 of 2000 are as follows:
When P.W.1 victim girl admitted that she did not know the name of the village and names of the parents of the accused, she would not have given the names of the accused in Ex.P1, the complaint. P.W.2 admitted that the police enquired all the accused at the Police Station and noted down their names and addresses. P.W.1 also stated that police brought all the accused to the Police Station. Therefore, F.I.R. must have been prepared only after arrest of the accused and these accused were identified in Court without any identification parade. Regarding the scene of occurrence, there is a variation between the evidence of P.W.1 and P.W.3. P.W.2 stated that only when P.W.1 came back from hospital, she gave a statement to the Head Constable P.W.7. This evidence of P.Ws.1 and 2 is against the evidence of P.W.7 and 10. There is also a delay in the F.I.R. reaching the Court.

13. The submission made by Mr.O.Venkatachalam, appearing for A8, the petitioner in Crl.R.C.No.120 of 2000 is as follows:
There is a variation in the evidence of P.Ws.1 and 3 with reference to the place. The accused were present in the Police Station on 13.4 .1990 itself when P.W.1 gave the complaint. Therefore, the evidence of P.W.10 that he arrested the accused on 15.4.1990 is false. When there is no material to show that P.W.1 knew the accused earlier, the identity of the accused cannot be said to be established in the absence of the identification parade. P.W.1 would state that she gave the statement at 5.00 A.M. on 13.4.1990. P.W.2 stated that only after the return from the hospital, P.W.1 gave complaint to the police. This shows that the

complaint given at 5.00 A.M. has been suppressed. Furthermore, when a girl is rapped on the sand for one hour, more injuries would have been found on the body of the victim, but strangely no injuries were found on the back. P.W.7 would admit that only it would be five minutes walk to reach the Court. Therefore, there is no reason as to why the F.I.R. reached the Court only at 1.50 P.M.

14. I have carefully considered the above oral submissions as well as written submission and also gone through the typed set containing the deposition of witnesses.

15. The entire case relating to the gang rape hinges upon the evidence of P.W.1. She would clearly state that she was forcibly taken in a cycle to a corner of Kattabomman Nagar and she was raped by all the accused one after another. P.Ws.2 and 3 are not the eye witnesses for the rape. But, the evidence of P.Ws.2 and 3 would make it clear that all of them went to Esakiamman temple function and P.Ws.1 and 2 alone came back home at midnight, as they felt sleepy and in the meantime, the occurrence had taken place.

16. P.W.2 would speak that they were surrounded by the 10 accused and P.W.1 was attacked with aruval by one of the accused and she was taken in a cycle to some other place. Immediately, P.W.2 rushed to Esakiamman temple and informed P.W.3. Then, P.W.3 came to the scene and found that 10 persons came out of the building and took the cycle and went away from the scene. Thereafter, P.W.3 entered inside the new incomplete built up house and found that P.W.1 lying down on the sand. Then, she was taken to house from where P.W.1, mother and P.W.2 went to the Police Station and gave a complaint to P.W.7 Head Constable at 5.00 A.M.

17. It is to be pointed out that all the accused persons belong to same place, namely Tuticorin. Admittedly, there is no enmity suggested to P.W.1. Therefore, there is no reason for P.W.1 to speak falsehood against all the accused, especially in a case of gang rape. Curiously, it was suggested to P.W.1 that she voluntarily went to V.O.C. Nagar and had sexual intercourse with some person. For this suggestion, there is no basis. On the other hand, it would amount to admitting the case of prosecution that on the date of occurrence, she was subjected to sexual intercourse.

18. The evidence of P.W.1 regarding the rape is sufficiently corroborated by P.W.4, the Doctor who found that the hymen of the victim ruptured and also found the injuries on breast and hand. Merely because there is no injury on the back, it cannot be argued that there was no rape at all. According to the prosecution, she was wearing the blouse at that time and also the occurrence took place on sand. The blouse was seized by the police and the same was marked.

19. It is contended that there is a variation in regard to the scene of occurrence. This also does not merit acceptance, in view of the fact that all these areas are situated in the same place. As per the

observation mahazar and the evidence of P.W.3, who rescued P.W.1 from the place of occurrence, the scene place is a newly built up corner house at Briand Nagar. Though P.W.1 would state that the occurrence took place at Kattabomman Nagar, it is elicited from P.W.1 and P.W.3 that Briand Nagar, Kattabomman Street and Ganesan Nagar, all situate in the same area. According to P.W.3, the eastern side of the Briand Nagar is Subbiah Mudaliarpuram where P.W.1's house is situated and the western side of the Briand Nagar is Chidambara Nagar, from where the girl was forcibly kidnapped. Furthermore, the evidence of P.W.9 and the observation mahazar and recovery of the torn clothes and human hair from the scene would clearly show that the occurrence took place in the Briand Nagar area which is nearer to the Kattabomman Street.

20. Much was said about delay in the F.I.R. Invariably in the rape cases, there would be delay. The parents of the victim would be reluctant to come to police to give a complaint of rape, since they may think that the victim's future will be spoiled. Under those circumstances, the delay in lodging the F.I.R. or the delay in F.I.R. reaching the Court in this case cannot be a ground to reject the prosecution case unless there is a material to show that the delay has been used by the prosecution to implicate several accused persons falsely.

21. Regarding the identity, it was argued that P.W.1 could not have given the names of the accused in the F.I.R. and the names of the accused were written by P.W.7 only after the arrest of the accused on that day.

22. It is the specific evidence of P.W.1 that she knew the names of the accused even though she may not know the parents of all the accused. It is true that P.W.2 would admit that the accused were found at the Police Station on the same day and they were interrogated by the police. This is purely a mistake, in view of the clear evidence of P.W.7 Head Constable and P.W.10, the Inspector of Police, who stated that the accused were not brought to the Police Station on that day and they were arrested only on 15.4.1990.

23. In a rape case, once the victim's evidence is believed, it is settled law that no corroboration is necessary. Furthermore, under Section 114-A of the Evidence Act, in a prosecution for rape under Section 376(2)(g) I.P.C., where sexual intercourse by the accused is proved, the Court shall presume that she was raped and she did not give consent for sexual intercourse.

24. In this case, the sexual intercourse by all the 10 accused has been proved by the evidence of P.W.1 which is corroborated by the medical testimony adduced by P.W.4 and as such, the evidential burden shifts on the accused to prove that she was subjected to sexual intercourse only with her consent. As indicated above, though it was suggested by the accused to P.W.1 that she had intercourse at the scene place with some other person only with consent, there is no attempt made by the accused

to establish the same, at least through preponderance of probability. Therefore, the offences under Sections 366 and 376(2)(g) are clearly made out. Consequently, t he conviction is liable to be confirmed and accordingly confirmed.

25. Let us now come to the sentence.

26. The petitioners were sentenced to undergo R.I. for five years for both the offences under Sections 366 and 376(2)(g) I.P.C. and directed the sentences to run concurrently. Though there is no minimum sentence for the offence under Section 366 I.P.C., there is a minimum sentence prescribed for the offence under Section 376(2)(g) I.P.C., which is a gang rape, which is liable to be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.

27. In this case, admittedly, the minimum sentence of 10 years and fine was not imposed. This Court, while dismissing the application for bail in Crl.M.P.No.1508 of 2000 on 18.8.2000 pointed out the illegality committed by the Courts below while imposing sentence of 5 years, namely less than minimum sentence of 10 years.

28. When the matter was taken up for final disposal, as indicated above, by the order dated 21.8.2001 Justice R.Balasubramanian expressed opinion that in this case, minimum punishment has to be imposed as prescribed by law, in view of the fact that no special reasons were given by the trial Court while imposing lesser sentence of 5 years. On the basis of the said opinion, the Registry was directed to issue show cause notice to the revision petitioners as to why their sentence for the offence under Section 376(g) I.P.C. shall not be enhanced to the minimum punishment prescribed under law.

29. As pointed out by the Additional Public Prosecutor, in the light of the decision of the Supreme Court in E.K.CHANDRASENAN v. STATE OF KERALA (1995(1) Crimes 421), this Court has power in an appropriate case to issue suo motu rule of enhancement of sentence. In the said decision, it has been specifically held by the Apex Court that while dealing with the matter relating to the conviction on an offence, the High Court can exercise its revisional power under Section 401 to issue a rule of enhancement, when it is found that sufficient sentence was not imposed on the accused.

30. It is also held in KIRPAL SINGH v. STATE OF HARYANA (2000(1) Crimes 53(SC) that neither the trial Court nor the High Court has jurisdiction to bypass the minimum limit of punishment prescribed by law for an offence on the premise that a plea-bargain was adopted by the accused. This would show that this Court has got powers to set right the orders of the Courts below in regard to punishment when they bypass the minimum limit of punishment prescribed by law.

31. It is contended by the counsel for the petitioners that proviso to Section 376(2)(g) I.P.C. empowers the Court to impose a lesser sentence even though minimum sentence of imprisonment is prescribed by providing the reasons for the same.

32. On the other hand, the Additional Public Prosecutor would submit that there is no special reason given by the trial Court while imposing lesser punishment and as such, the minimum punishment has to be imposed on the petitioners as opined by Justice R.Balasubramanian in his order dated 21.8.2001.

33. The reading of Section 376 I.P.C. would clearly show that the minimum punishment is 10 years and the same may be extended to life and shall also be liable to fine. The language of the proviso to section makes it abundantly clear that the Court is under an obligation to impose a minimum punishment once the conviction is recorded under Section 376(2)(g). Undoubtedly, the proviso confers power on the Court to award less than minimum punishment, if the Court convicting and sentencing the accused, is of the opinion that for any special reasons which the Court is under an obligation to record in writing, a sentence of imprisonment for a term less than the minimum is called for.

34. In this case, the only reason given by the trial Court while imposing the sentence of five years is that all the accused persons at the time of occurrence were only youngsters of 22 years old and therefore, the lesser sentence of five years can be imposed.

35. The question that arises for consideration is whether the fact that the accused persons were youngsters at the time of gang rape would be construed an adequate and special reason for imposing lesser punishment?

36. While interpreting the words "adequate and special reasons", the Supreme Court in NEET SINGH v. THE STATE OF PUNJAB (1980 L.W. (Crl.) 119) would make the following observation:
"The reasons have to be special reasons. The words 'special reasons' in the context in which they are used could only mean special to the accused on whom sentence is being imposed. The Court has to weigh reasons advanced in respect of each individual accused whose case is taken up for awarding sentence. The word 'special' has to be understood in contradistinction to the word 'general' or 'ordinary'. Now, what does term 'special' connote? "Special" means distinguished by some unusual quality; out of the ordinary. Webster defines "special" as particular; peculiar; different from others; designed for a particular purpose, occasion, or person; limited in range; confined to a definite field of action. Thus anything which is common to a large class governed by the same statute cannot be said to be special to each of them. It would thus unquestionably appear that "special reasons" in the context of sentencing process must be special to the facts and the circumstances of the case in which the sentence is being awarded."

37. Similarly, this Court in UNION OF INDIA v. V.P. SELVARAJAN (19 76

L.W. (Crl.) 50) would observe thus:
"The circumstances also must be special in the sense that they should be different from the normal. While using the circumstances for imposing a lenient sentence, the primary consideration should be whether the circumstances are special to the case. The special circumstances should be of such a nature which should have relation to the offence and not to the offender."

38. If these principles are applied to the present case, it is obvious that the offenders were youngsters at the time of commission of gang rape cannot be considered to be an adequate or special reason.

39. When the counsel for the petitioners were asked as to whether they could give some other reason as a special or adequate reason to sustain the order of sentence of five years, they were not able to point out any other circumstances. However, the counsel for the petitioners would cite the decisions in PAUL SINGH v. STATE OF HARYANA (198 0 CRI.L.J.8), RAJU KRISHNA v. STATE OF KARNATAKA (1994(1) Crimes 15 6) and PADAM BAHADUR v. STATE OF SIKKIM (1981 CRI.L.J.1317), wherein the sentence for rape was given as 2 years, 3 years and 4 years respectively.

40. On going through the facts of the said cases, it is noticed that in those cases, various adequate and special reasons were given by the High Courts and the Supreme Court taking into consideration the facts and circumstances of those cases for giving lesser punishment. In one of those cases, the victim herself requested the Court to reduce sentence in view of the subsequent developments and taking note of the same, the Supreme Court reduced the sentence on the offender of rape.

41. Those special features are not available in the instant case. This is a case where a young girl of 19 years, while she was walking in a public street along with her sister, was waylaid and forcibly abducted by 10 accused persons by showing the aruval and after taking her to a secluded place, she was raped by all the 10 accused one after another mercilessly, thereby they committed a gang rape. The facts of this case are such that they would not permit this Court to show any sympathy to the accused persons.

42. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It must be remembered that a rapist not only violates the victim's privacy and personal integrity, but also inevitably causes serious psychological as well as physical harm in the process. Even a murderer destroys only physical body of the victim, but a rapist degrades the very soul of the helpless woman.

43. The Courts, therefore, shoulder a great responsibility while imposing appropriate punishment on the offenders of the rape whenever it is found that offence is proved. Bearing the same in mind the Legislature thought it fit to impose a minimum sentence of ten years on

the rapist, though under proviso a lesser punishment can be imposed provided the adequate or special reasons to be recorded in the judgment.

44. So, in the absence of any special or adequate reason and also in the light of the facts depicting the manner of the occurrence in which the helpless girl of 19 years was forcibly abducted in a cycle when she was walking along the public road and she was taken to the scene place where gruesome gang rape was committed by the group of 10 persons,, I am constrained to hold that the sentence of five years for the offence under Section 376(2)(g) I.P.C. is illegal and the same has to be enhanced to a minimum imprisonment of ten years, as correctly found by Justice R.Balasubramanian by the order dated 21.8.2001. Furthermore, the sentence would provide fine also.

45. Under those circumstances, the petitioners are liable to be sentenced for R.I. ten years and to pay a fine of Rs.1,000/- each, in default to undergo R.I. for one year for the offence under Section 376(2)(g) I.P.C.

46. With the above observation, these revisions are disposed of.

4-03-2002
Index: Yes (I)

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Sd/-
Assistant Registrar.

/True Copy/

Sub Asst. Registrar.

To
1) The Principal Sessions Judge, Tuticorin.
2. The Assistant Sessions Judge, Tuticorin.
3) The Superintendent of Central Prison, Palayamkottai.
4) The Public Prosecutor, High Court, Madras.

M. KARPAGAVINAYAGAM,J.

Crl.R.C.No.120 and 206 of 2000.
4-03-2002